Select Portfolio Servicing, Inc. v Fowkes
2019 NY Slip Op 30277(U)
February 5, 2019
Supreme Court, Suffolk County
Docket Number: 35828/2010
Judge: Howard H. Heckman

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 35828/2010
MOTION DATE: 1/18/2019
MOTION SEQ. NO.: #004 MG
#005 MD
CASE DISP

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SELECT PORTFOLIO SERVICING, INC.,

Plaintiff,

-against-

WILLIAM J. FOWKES, et al.,

Defendants.
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PLAINTIFF'S ATTORNEY:
ALDRIDGE PITE, LLP
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MELVILLE, NY 11747

DEFENDANTS' ATTORNEY:
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Upon the following papers numbered 1 to 19 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-5 (#004) ; Notice of Cross Motion and supporting papers 6-16 (#005) ; Answering Affidavits and supporting papers 17-19 ; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Select Portfolio Servicing, Inc. for an order confirming the referee's report of sale dated January 21, 2016 and for a judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion by defendant William J. Fowkes seeking an order pursuant to CPLR 3211(a)(1), 4313, 4403, 5001(a) & 6514 & RPAPL 1304 & 1306: 1) dismissing plaintiff's complaint for failure to comply with RPAPL 1304 requirements and cancelling the notice of pendency or, in the alternative: 2) denying plaintiff's motion; 3) rejecting confirmation of the referee's report and compelling the referee to conduct a hearing, or in the alternative: 4) deny plaintiff's application for the recovery of interest on the underlying indebtedness is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $340,750.00 executed by defendant William J. Fowkes on December 21, 2006 in favor of Continental Home Loans, Inc.. On the same date mortgagor Fowkes executed a promissory note promising to re-pay the total amount of monies borrowed from the lender. The mortgage and note were assigned to plaintiff by assignment dated September 15, 2010. Defendant defaulted in making timely monthly mortgage payments beginning March 1, 2010 and continuing to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on September 23, 2010. Defendant/mortgagor served a timely answer. By short form Order (Hinrichs, J.) dated March 27, 2014 defendant's cross motion to amend his answer was granted– the amended answer set forth two affirmative defenses, neither of which were defenses claiming violations of RPAPL 1304 & 1306. By short form Order (Murphy, J.) dated November 10, 2015, plaintiff's motion for an order granting summary judgment and for the appointment of a referee was granted.

Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale. Defendant's cross motion claims that: 1) plaintiff's complaint must be dismissed based upon plaintiff's failure to prove service of RPAPL 1304 pre-foreclosure notices or, in the alternative; 2) plaintiff's motion must be denied and the referee's report should not be confirmed since defendants are entitled to a referee's hearing or, in the alternative: 3) plaintiff's application seeking interest on the indebtedness must be denied.

Procedurally, plaintiff's motion was served on February 1, 2016 with an original return date of April 4, 2016; defendant's cross motion was served on May 9, 2016 with an original return date of May 17, 2016. Both motions were marked submitted in IAS Part 25 as of May 17, 2016. Both motions remained sub judice for more than two and one-half (2 ½) years. By Administrative Order 114-18 (Hinrichs, J.) dated December 11, 2018 this action and both motions were assigned to this Part. Upon assembling all motion papers, including the county clerk's file, both motions were marked submitted on this Part's motion calendar on January 18, 2019.

With respect to defendants' claims concerning procedural and substantive issues surrounding the referee's report and computations, no legal basis exists to deny confirmation of the referee's report. Plaintiff's submissions establish its entitlement to a judgment of foreclosure and sale based upon the referee's report and findings (*see U.S. Bank, N.A. v. Saraceno,* 147 AD3d 1005, 48 NYS3d 163 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons,* 125 AD3d 930, 5 NYS3d 175 (2nd Dept., 2015)). Whereas the court is not bound by the referee's report of the damages due the plaintiff, the report of a referee should be confirmed in circumstances where the findings are substantially supported by the evidence in the record (*CitiMortgage, Inc. v. Kidd,* 148 AD3d 767, 49 NYS3d 482 (2nd Dept., 2017); *Matter of Cincotta,* 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case the plaintiff submitted sufficient evidence in the form of an affidavit from the mortgage servicer/attorney-in-fact's (Select Portfolio Servicing, Inc.'s) document control officer dated December 31, 2015, together with sufficient documentary proof, to establish the accuracy of the referee's computations and to confirm the finding that the mortgaged premises should be sold in one parcel (*CitiMortgage, Inc. v. Kidd, supra.; Hudson v. Smith,* 127 AD3d 816, 4 NYS3d 894 (2nd Dept., 2015)).

With respect to the issue of whether a referee's hearing is required, the relevant statutes provide this court with authority to determine this issue and grant to the court the prerogative and authority to limit the powers of the referee.

Specifically CPLR 4311 states:

R 4311. Order of reference.

An order of reference shall direct the referee to determine the entire action or specific issues, to report issues, to perform particular acts, or to receive and report evidence only. ***It may specify or limit the powers of the referee*** and the time for filing his report and may fix a time and place for a hearing. (***emphasis supplied).***

And CPLR 4313 states:

R 4313 Notice.

Except where the reference is to a judicial hearing officer or a special referee upon the entry of an order of reference, the clerk shall send a copy of the order to the referee. ***Unless the order of reference otherwise provides,*** the referee shall forthwith notify the parties of a time and place for the first hearing to be held within twenty days after the date of the order or shall forthwith notify the court that he declines to serve (***emphasis supplied).***

In this case the authority of the referee was specifically defined by Acting Justice Murphy's Order of Reference which limited the referee's power "to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided for by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgaged premises can be sold in one parcel". By limiting the referee's duties, as statutorily authorized , no hearing is required and the defendant retains the right to submit relevant, admissible evidence in opposition to the referee's computations directly to this court so that the court could consider the merits of the relevant arguments made in support of both parties. Defendants have submitted no relevant, admissible proof to contradict the plaintiff's evidence and have merely submitted an attorney's affirmation making generalized and conclusory "entitlement" objections to the referee's computations. The court continues to recognize that the referee's report is advisory only (*see Deutsche Bank National Trust v. Zlotoff et al., supra.; FDIC v. 65 Lenox Road Owners Corp.,* 270 AD2d 303, 704 NYS2d 613 (2nd Dept., 2000); *Adelman v. Fremd,* 234 AD2d 488, 651 NYS2d 604 (2nd Dept., 1996); *Stein v. American Mortgage Banking, Ltd.,* 216 AD2d 458, 628 NYS2d 162 (2nd Dept., 1995)) However, the only relevant, admissible and credible evidence submitted is the proof submitted by the plaintiff in support of the referee's computations.

In point of fact, the computations concern facts which are not in dispute:

First: Defendant defaulted in making mortgage payments under the terms of the mortgage loan as of March 1, 2010;

Second: The mortgage and promissory note provide a fixed interest rate of 6.5% computed beginning February 1, 2010 through December 24, 2015— a purely ministerial computation of principal ($339,221.42) and interest ($130,010.91);

Third: The court takes judicial notice of the fact that it became the obligation of the mortgage lender to make payments for real estate taxes and for hazard insurance which became due and which were not paid by the defaulting borrower since March 1, 2010. Failure to pay property taxes would result in the loss of title to the County; Failure to pay hazard insurance could result in loss of the investment in the premises. Yearly property taxes are a matter of public record; yearly hazard insurance can be computed based upon established premiums. Both amounts are merely purely ministerial computations of amounts due, paid and to be reimbursed and are reflected in the referee's statement as "escrow advances" ($29, 213.88);

Fourth: The remaining computations concern "pre-acceleration late charges" ($146.96); "property inspections" ($302.35) & "valuations" ($13.00) and are self-explanatory.

Based upon this record defendant has been afforded an opportunity to submit relevant, admissible evidence in opposition to the referee's findings sufficient to contradict the calculations, or to provide admissible credible proof for the court to modify the referee's computations. No admissible testamentary or documentary proof has been submitted by the defendant. Absent such evidence the only relevant, admissible proof before this court has been submitted by the plaintiff and therefore no legal basis exists to deny plaintiff's motion to confirm the referee's report since the court is the ultimate arbiter of the amount of damages due the plaintiff (*see Deutsche Bank National Trust Company v. Zlotoff et al. supra.; FDIC v. 65 Lenox Road Owners Corp.* , 270 AD2d 303, 704 NYS2d 613 (2nd Dept., 2000); *Adelman v. Fremd,* 234 AD2d 488, 651 NYS2d 604 (2nd Dept., 1996); *Stein v. American Mortgage Banking Ltd.,* 216 AD2d 458, 628 NYS2d 162 (2nd Dept., 1995)).

With respect to the issue of forfeiture of interest, since this is an equitable action the recovery of interest is within the court's discretion and the exercise of such discretion must be governed by the particular facts of the case including "wrongful" conduct on the part of either party (*see BAC Home Loans Servicing, LP v. Jackson,* 159 AD3d 861, 74 NYS3d 59 (2nd Dept., 2018); *Greenport Mortgage Corp. v. Lamberti,* 155 AD3d 1004, 66 NYS3d 32 (2nd Dept., 2017); *Citicorp Trust Bank v. Vidaurre,* 155 AD3d 934, 65 NYS3d 237 (2nd Dept., 2017)). An unexplained and prolonged delay which results in unusual circumstances substantially prejudicing a party could result in forfeiture of interest during the unexplained period of delay (*BAC Home Loan Servicing, LP v. Jackson, supra.*). In this case there has no showing of "wrongful" conduct on the part of the plaintiff sufficient to in any way justify denying plaintiff an award for interest. The record shows defendant obtained more than $340,000.00 on the promise that he would pay it back; that defendant defaulted in making any payments for nearly the past nine years; that plaintiff has been obligated to pay property taxes and hazard insurance for nearly the past nine years; and that defendant continues to own and remain in the premises during this entire period. As an equitable action, the equities balance heavily in favor of the non-defaulting party..

With respect to defendant's attempt to seek dismissal of the complaint based upon "documentary evidence" pursuant to CPLR 3211(a)(1), the defendant has clearly waived any right to serve such a motion since it is clearly untimely (see CPLR 3211(e)). Moreover, while the law is clear that a RPAPL 1304 notice defense may be raised by a non-defaulting party any time prior to judgment, such a defense is waived where defendants fail to raise it in opposition to a plaintiff's summary judgment motion (*see New York Community Bank v. J Realty F Rockaway, LTD.,* 108 AD3d 756, 969 NYS2d 796 (2nd Dept., 2013); *Starkman v. City of Long Beach,* 106 AD3d 1076, 965 NYS2d 609 (2nd Dept., 2013)). In this case, the defendant did oppose plaintiff's summary judgment motion by submitting opposition in the form of an attorney's affirmation which asserted *only* the defense of plaintiff's alleged lack of standing. Defendant did not raise the defense of plaintiff's failure to serve and file the pre-foreclosure 90-day notices required pursuant to RPAPL 1304 & 1306 (nor was it set forth in his amended answer) and Acting Justice Murphy's November 10, 2015 Order determined that plaintiff had made a prima facie showing of entitlement to summary judgment. The Order addressed the arguments raised by the defendant and concluded that such arguments were without merit. As a result the prior Order necessarily determined that plaintiff was entitled to judgment and struck all defenses asserted (or which should have been asserted) in defendant's answer and all defenses which should have been asserted in opposition to plaintiff's motion,

including the two defenses defendant now seeks to assert in his opposition papers to this motion.

The doctrine of res judicata prevents a party from litigating a claim which has already been litigated or which ought to have been litigated (*see* Siegel, "New York Civil Practice" Sects. 4442, 4443 pp. 585). The principle is grounded upon the premise that "once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again." (*see Gramatan Homes v. Lopez,* 46 NY2d 484, 484, 414 NYS2d 308 (1979); *Davey v. Jones Hirsch Connors & Bull,* 138 AD3d 417, 27 NYS3d 867 (1st Dept., 2016); *Matter of JPMorgan Chase,* 135 AD3d 762, 24 NYS3d 667 (2nd Dept., 2016)). The related law of the case doctrine is a rule of practice which provides that once an issue is judicially determined either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation (*see Martin v. City of Cohoes,* 37 NY2d 162, 371 NYS2d 687 (1975); *J-Mar Service Center, Inc. v. Mahoney, Connor & Hussey,* 45 AD3d 809, 847 NYS2d 130 (2nd Dept., 2007); *Vanguard Tours, Inc. v. Town of Yorktown,* 102 AD2d 868, 477 NYS2d 40 (2nd Dept., 1984); *Holloway v. Cha Laundry, Inc.,* 97 AD2d 385, 467 NYS2d 834 (1st Dept., 1983)).

Clearly, in this case, this Court's Order awarding the plaintiff summary judgment is the "law of the case" and it precludes consideration of defendant's abandoned and waived RPAPL 1304 & 1306 notice defense that was stricken by the prior order (*see Madison Acquisition Group, LLC, v. 7614 Fourth Real Estate Development, LLC,* 134 AD3d 683, 20 NYS43d 418 (2nd Dept., 2015); *Certain Underwriters at Lloyd's of London v. North Shore Signature Homes, Inc.,* 125 AD3d 799, 1 NYS3d 841 (2nd Dept., 2015). Having failed to either seek to reargue the prior order or to seek leave to appeal it, no legal basis exists to re-consider the court's prior determination.

Accordingly, defendant's cross motion is denied, and plaintiff's motion seeking an order confirming the referee's report of sale and for a judgment of foreclosure and sale is granted. The proposed judgment of foreclosure and sale has been signed simultaneously with the execution of this order.

HON. HOWARD H. HECKMAN, JR.

Dated: February 5, 2019

J.S.C.